Supreme Court, U. S.
FILED
NOV 20 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-628

CALIFORNIA ASSOCIATION OF UTILITY SHAREHOLDERS (a corporation),

Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND JOHN E. BRYSON, VERNON L. STURGEON, RICHARD D. GRAVELLE, CLAIRE T. DEDRICK, and LEONARD M. GRIMES, JR., the members of said Public Utilities Commission; THE PACIFIC GAS AND ELECTRIC COMPANY, a corporation,

Appellees.

On Appeal From the Supreme Court of the State of California

APPELLANT'S BRIEF OPPOSING COMMISSION'S MOTION TO DISMISS

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Utility Shareholders

November 20, 1979

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Contrary to the argument made by the Commission, the Shareholders do not contend that the Commission ignored the impact of inflation. Of course today's prices reflect past inflation. What the Shareholders contend is that the Commission ignored attrition, that is the demonstrated continuing change in the relationship be-

tween the Company's investment and net earnings. That the Commission ignored attrition is confirmed by the Commission's Motion to Dismiss. There is nothing in that document which even indicates an awareness of what attrition is, let alone anything which implies that the Commission dealt with it in any way.

The legislative act of fixing rates for the future is supported by a yardstick which is familiar to this Court, namely, the test year ratio between net earnings and net investment. The Commission picked 12.83% on equity as a rate of return. The Commission ignored the fact that it used a rubber yardstick, since *any* rate of return decays at the rate of 0.16% per month. The Shareholders' evidence regarding attrition was unchallenged and uncontradicted. The right of the Shareholders to fair treatment, guaranteed by the Constitution and by this Court, has been destroyed by the use of figures which do not take account of the changing yardstick. The fact that the Commission says nothing about it in its 107 page opinion, that the Supreme Court of California says nothing about it, and that, in addressing this Court, Commission's counsel say nothing about it, adds insult to injury. The Commission does not bother to discuss this violation of constitutional rights.

The Shareholders' evidence involved continuing inflation at the rate of 6% per annum. In fact, raging inflation has proceeded at twice that rate. The Company has never, since 1973, earned the rate of return "allowed" by the Commission. The Shareholders' equity is confiscated; California law requires the Company to sell new stock, below book value, expropriating equity step by step. The October, 1979, sale of common stock increased to $350 million (from $279 million; Jurisdictional Statement, page 9) the confiscation of common

equity. The market to book ratio of the Company's common stock is 75% (October 31 price, June 30 book value, from Salomon Brothers' "Electric Utility Common Stock Data", dated November 2, 1979). For the 100 leading utilities the market to book ratio was 79%. Typical California utilities as of the same date: Southern California Edison, 72%; San Diego Gas & Electric, 78%.

The 12.83% rate of return on equity is too low, yet *on this appeal* the Shareholders' argument is not that it cannot be derived from the fictitious test year data. Shareholders contend that this rate of return (or *any* rate of return) is a hoax, and violates constitutional rights, when it does not take account of the fact that the inputs are changing.

The electric and gas utilities are of vital importance as our energy problems grow. Our entire economy rests on them. Their ability to serve is being destroyed, nationwide, by regulation which violates the decisions of this Court. This is a critical national problem.

The failure to adjust the rubber yardstick (which failure is admitted by the Commission's submission to this Court) means that the tests of *Hope* and *Bluefield** are violated: the fictitious rate of return does not attract capital on reasonable terms and does not assure (in fact, it destroys) the financial integrity of the utilities. The Commission does not bother to deny this. The market to book ratios are engraved on the tombstones of the utilities, and the Commission ignores them. The Commission invokes the "result reached"

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* *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944); *Bluefield Water Works & Improvement Co.* v. *Public Service Commission of West Virginia*, 262 U.S. 679, 693 (1923).

language of *Hope* (Commission's Motion, p. 5). The fact is that the result reached is horrible: PG&E equity holders are being destroyed, and the Commission necessarily admits the repeated, state-compelled sale of stock below book, using locked-in capital as bait to be sold cheap to new investors. On the "result reached" standard, the Commission is shown as completely indifferent to the decisions of this Court and the constitutional rights of Shareholders.

The appropriate remedy is for this Court to reverse and remand, with instructions to take account of attrition and to make a *bona fide* determination of a proper allowance.

The Court should deny the Motion to Dismiss and note probable jurisdiction of this appeal.

Respectfully submitted,

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